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No. 73-1462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

MARK WHITE, ET AL., APPELLANTS

v.

DIANA REGESTER, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES REGESTER, BERNAL, AND ESCALANTE TO DISMISS AND IN OPPOSITION TO APPELLANTS' MOTION TO DISPENSE WITH PRINTING

VILMA S. MARTINEZ
SANFORD JAY ROSEN
GEORGE J. KORBEL
Mexican-American Legal Defense and Educational Fund, Inc.
201 N. St. Mary's Street
501 Petroleum Commerce Building
San Antonio, Texas 78205
512-224-5476

DAVID RICHARDS
600 W. 7th Street
Austin, Texas 78701

DON GLADDEN
MARVIN COLLINS
702 Burk Burnett Building
Fort Worth, Texas 76102

April 5, 1974

NO. 73-1462

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

MARK WHITE, ET AL., Appellants

V.

DIANA REGESTER, ET AL., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS AND IN OPPOSITION TO APPELLANTS' MOTION TO DISPENSE WITH PRINTING

Appellees Diana Regester, Joe Bernal, and Frank A. Escalante, move this Court to dismiss Appellants' appeal for failure to docket within the time allotted by the Rules of this Court and to deny appellants' "Motion for Leave to Dispense With Printing" of their jurisdictional statement.

STATEMENT OF THE CASE

The trial of this matter was before a three-judge federal district court in December, 1973. A judgment for Appellees was

rendered on January 28, 1974. In this judgment, the utilization of multi-member state legislative districts in seven of Texas' largest urban areas was found to unconstitutionally submerge the votes of Blacks and Mexican Americans. In a collateral matter tried at this same time, the legislative district comprising a substantial portion of Galveston County was likewise found to be constitutionally infirm because of a racial gerrymander.

A notice of appeal was filed by Attorney General of Texas on January 30, 1974.

On April 1, 1974, the final day for docketing the appeal, Appellants, through the Texas Attorney General, filed ten typewritten copies of a jurisdictional statement together with 40 copies of a printed appendix. The jurisdictional statement was typed on 8½" by 11" paper and stapled in the upper left hand corner. Neither the typewritten jurisdictional statement, nor the appendix thereto, contains a copy of the notice of appeal.

Two days after the expiration of the period allowed by the rules for the docketing of an appeal the State paid the docketing fee and filed a document entitled "Motion for Leave to Dispense with Printing", attached hereto as Exhibit "A", in which this Court was asked for an extension for an unspecified period of time to allow the State to print and file their jurisdictional statement. No affidavit or other explanation was profferred to explain the reason the State was unable to file a jurisdictional statement printed in conformity with the Rule 39 of this Court. Absolutely no grounds were suggested by the State of Texas in support of their motion to dispense with printing.

No motion was made by Appellants to ex-

tend time or to dispense with any other requirement of the Rules of this Court within the time allotted for docketing an appeal.

ARGUMENT

Rule 13 provides that in appeals pursuant to 28 U.S.C. 1253, Appellants must docket their appeal within sixty days after filing the notice of appeal. An appeal is docketed when the counsel for the Appellant pays the docket fees and files forty copies of a jurisdictional statement printed in conformity with Rules 15 and 39. The only exception to the payment of docketing fees and the filing of forty printed copies is a proceeding in forma pauperis pursuant to Rule 53.

The State of Texas is clearly not attempting to proceed in forma pauperis for it has not filed the requisite motions and supporting data pursuant to Rule 53 and it would be frivolous for the State to claim such a right.

When the attorney general failed to pay the fee and file the requisite printed copies of the jurisdictional statement, he simply did not fulfill the docketing requirements set down in the rules of this Court. Two days after the time for docketing the appeal had expired, in an attempt to gloss over their neglect, the State filed a document entitled Motion for Leave to Dispense with Printing. (Exhibit A). This motion, filed out of time, is nothing but a thinly veiled motion to extend time for docketing the appeal. The extension requested should not be granted by this Court for several reasons. First, under Rule 34(2) such a motion must be presented to the clerk "within the period sought to

be extended." Here the motion was filed at least two days after the period expired. Second, an extension of time must be accompanied by a showing of good cause and if made within ten days of the end of the period sought to be extended "extraordinary circumstances" must be shown. Not only has there been no showing of extraordinary circumstances but there has not been an explanation of any sort. Rather the State cavalierly refers to it as simply "an oversite" See Exhibit "C". Next the motion requests only an extension of time and sets out no specific period. This severly prejudices the Appellees, who have only thirty days to respond to the jurisdictional statement. Appellees who wish to cite to the arguments of the State in the jurisdictional statement, must wait until the printed document is available for such references in order to avoid confusion. This effectively delays the filing of the Motion to Dismiss and/or to Affirm and subsequent consideration by this Court. Time is especially crucial in this case since it deals with elections for the state legislature in an election year.

Historically this Court has refused to entertain appeals which were not properly docketed within the time period provided by Rule 13 (1) especially where the Appellants fail to offer any substantial excuse for such failure. For example, in Pittsburgh Towing Company v. Mississippi Valley Barge Line Company, 385 U.S. 32 (1966), this Court dismissed a direct appeal from a judgment of a district court where the appellant failed to docket in the time period provided by Rule 13 (1). As this Court noted in dismissing the appeal:

> "During that period [the 60 days allowed for docketing] appellant made no application for an enlarge-

ment of time, either to the District Court or to a Justice of this Court (see Rule 13 (1)) nor did any explanation accompany the untimely docketing of the appeal." 385 U.S. at 32.

This Court has dismissed such appeals even when the federal question presented is clearly substantial and the applicable time period for docketing was violated by only a very short period of time. In closely analogous case of Shapiro v. Doe, 396 U.S. 488 (1970), this Court dismissed an appeal from an order of a three-judge court enjoining the enforcement of a Connecticut State Welfare regulation because the State was two days late in docketing their appeal pursuant to Rule 13.

In Snider v. All State Administrators, Inc., __U.S.__, 94 S. Ct. 771 (1974), this Court specifically commented on a situation similiar to that of the State. Snider had filed a motion to dispense with printing of his petition for a writ of certiorari pursuant to Rule 39 but, had not attempted to proceed in forma pauperis pursuant to Rule 53. As this Court noted, the printing requirement is clearly explained in the rules and exists for important reasons. Snider, 94 S. Ct. at 772. Thus, even though the motion was filed prior to the expiration of the time for docketing it was denied because there was no showing which would justify dispensing with the printing of the petition for writ of certiorari.

In Snider, this Court chose to spare the individual litigant a resulting dismissal for failure to file the printed petition for writ of certiorari and allowed him a period of 21 days to correct his mistake. However, the Court was careful to warn that such generous treatment was given:

"Because our view as to the probable

failure of motions such as [this] may not have heretofore been apparent to the bar....." 94 S. Ct. at 772

It was implicit that others on notice by Snider who chose to ignore the rules of this Court may not expect such indulgence.

The neglect of the State of Texas is obvious and unexplained. The attorney general's letter of March 31, 1974, attached hereto as Exhibit "B" demonstrates that he chose to ignore Rules 13 (1) and 39. Even when notified by the Clerk of this Court that the typewritten jurisdictional statement was unacceptable, the attorney general attempted to pass it off as merely an "oversite" (sic). Exhibit C. Furthermore the motion to dispense with printing and extend time for docketing the appeal together with the check for the docketing fee was mailed from Austin, Texas on April 1, 1974. This was the last day of the period allowed to docket the appeal and it was a manifest physical impossibility for such to be received by this Court on the same day. In fact, the motion and fee were not filed in this Court until at least two days later. Clearly out of time.

The decision in Snider (supra) was a notice to the State that it could not do what it did. Snider was decided on January 21, 1974 and reported in U.S. Law Week the next day. 42 U.S.L.W. 3419. It was published in the Supreme Court Reporter on February 15, 1974 and in the Lawyer's Edition on February 18, 1974. 94 S. Ct. 771; 39 L. Ed. 2d 90. Thus the decision was available to the State a full week before they even filed their notice of appeal.

The attorney general of Texas, hardly a neophyte in matters before this Court, can

offer no excuse for the failure to follow the warnings sounded in Snider to abide by the rules of this Court.*

It is submitted that this Court's directions to the Clerk in Snider (supra) were crystal clear:

> The Clerk will be instructed not to accept for record a petition for certiorari or other document which is subject to Rule 39 and fails to conform to the requirements of the Rule... 94 S. Ct. at 772.

CONCLUSION

We respectfully pray that the Motion of the State of Texas to dispense with printing which has been filed out of time be denied and that their Appeal be dismissed for failure to comply with the Rules of this Court..

Respectfully submitted,

VILMA S. MARTINEZ
SANFORD JAY ROSEN
GEORGE J. KORBEL

DAVID RICHARDS
MARVIN COLLINS
DON GLADDEN

BY: _____
GEORGE J. KORBEL

BY: _____
DON GLADDEN

* It is submitted that the unexplained actions of the State of Texas fail even the less stringent test of "palpable neglect" which was suggested by Justice Douglas in his dissenting opinion in Hutter v. Korzen, 409 U.S. 905 (1972).

PROOF OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that a copy of the foregoing Motion has this the 8th day of April, 1974, been served upon each counsel of record for appellants in accordance with Rule 33 of this Court, by depositing the same in a United States mail box, with first class postage prepaid, addressed to said counsel at their post office addresses.

Don Gladden

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

* * *

NO. _____

* * *

MARK WHITE, ET AL.,
Appellants

V.

DIANA REGESTER, ET AL.,
Appellees

MARK WHITE, ET AL.,
Appellants

V.

FRANK A. ESCALANTE, ET AL.,
Appellees

MARK WHITE, ET AL.,
Appellants

V.

JAMES GASKIN, ET AL.,
Appellees

MARK WHITE, JR., ET AL.,
Appellants

V.

WANDA CHAPMAN, ET AL.,
Appellees

* * *

MOTION FOR LEAVE TO DISPENSE WITH PRINTING

* * *

COMES NOW, Mark White, et al., Appellants, by their attorney and moves this Honorable Court to dispense with the requirement of Rule 15, Supreme Court Rules, that the Jurisdictional Statement be printed, until such time as the printed copies of the Jurisdictional Statement are available and can be substituted for the typewritten copies presently on file.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this Honorable Court allow them to dispense with the printing of the Jurisdictional Statement until such time as the printed copies may be substituted for typewritten copies.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

Exhibit A

THE ATTORNEY GENERAL
OF TEXAS

JOHN L. HILL
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

March 31, 1974

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: White, et al. v. Regester, et al.;
White, et al., v. Gaskin, et al.;
White, et al., v. Escalante, et al.;
White, et al. v. Chapman, et al.

Dear Mr. Rodak:

Enclosed please find ten typewritten copies of our Jurisdictional Statement and 40 printed copies of the Appendix to Jurisdictional Statement. The typewritten Jurisdictional Statement will be replaced by printed copies within the next few days as per our telephone conversation and letter of last week.

Very truly yours,

Larry F. York
First Assistant Attorney General

LFY:km
Enclosures

cc: Mr. Norman M. Bonner
Mr. Don Gladden
Mr. Phillip Crawford
Mr. Dave Richards
Mr. George Korbel
Mr. R. James George, Jr.

Exhibit B

THE ATTORNEY GENERAL
OF TEXAS

JOHN L. HILL,
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

April 1, 1974

Mrs. Margaret McFarland
Office of the Clerk of the
Supreme Court of the United States
Washington, D. C. 20543

Re: Mark White, et al. v. Diana Regester, et al., etc., In The Supreme Court of the United States, October Term, 1973

Dear Mrs. McFarland:

Enclosed please find a check in the amount of $100.00 which is to accompany to Jurisdictional Statement filed in the above captioned litigation on April 1, 1974 and an original and nine copies of the Motion to Dispense with Printing, pending the substitution of printed copies of the Jurisdictional Statement for the typewritten copies presently on file.

Thank you for notifying this office of our oversite and your continued assistance and cooperation.

Very truly yours,

Larry F. York
First Assistant Attorney General

LFY:km
Enclosures

cc: Mr. Norman M. Bonner
Mr. Don Gladden
Mr. Phillip Crawford
Mr. Dave Richards
Mr. George Korbel
Mr. R. James George, Jr.

Exhibit C